JD(ATL)–06–04
Valdosta, GA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

PARKWOOD DEVELOPMENTAL CENTER, INC.

and **CASE 12–CA–22866**

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION LOCAL 1996, AFL-CIO, CLC

Chris Zerby, Esq.,
Counsel for General Counsel.
Clifford H. Nelson, Jr., Esq.,
Counsel for Respondent.
James D. Fagan, Jr., Esq.,
Counsel for Charging Party.

DECISION

A hearing was held in Valdosta, Georgia on October 29, 2003. I have considered the entire record and briefs filed by Respondent and General Counsel in reaching this decision.

JURISDICTION

At material times Respondent has been a Georgia corporation with an office and principal place of business in Valdosta, Georgia, where it has been engaged in the operation of a developmental center for handicapped residents. In conducting its business operations, Respondent annually derives gross revenue in excess of $100,000. Annually, in conducting its business operations, Respondent purchases and receives goods valued in excess of $50,000 at its Valdosta facility directly from points outside Georgia. Respondent has been an employer engaged in commerce within the meaning of the National Labor Relations Act (Act), at all material times.

LABOR ORGANIZATION

At material times the charging party (Union) has been a labor organization within the meaning of the Act.

Bargaining Unit:

The following employees constitute a unit appropriate for the purposes of collective bargaining:

> *All full-time and regular part-time employees employed at Parkwood Developmental Center, Valdosta, Georgia, including custodians, housekeeping aids, unit housekeepers, laundry employees, maintenance employees, car/bus drivers, horticulturists, cooks, assistant cooks, dietary aides, dietary AM/PM janitors, social work technicians, direct care staff employees, behavior program aides, medication nurses, treatment nurses, infection control nurses, physical health records nurses, transportation aides, sensorimotor therapists, but excluding receptionist, secretary to the Administrator, purchase coordinator, accounting/bookkeeper, QMRP'S and QMR records auditor, clinical records staff, computer data and program specialists, team leader supervisors, computer specialist and assistant to Personnel Director, professional employees, managerial employees, guards and supervisors as defined in the Act.*

The Disputed Issues:

Briefly stated this matter originated when Respondent received a petition from a majority of its unit employees in December 2002. Respondent then notified the Union that it was withdrawing recognition at the end of its existing contract. General Counsel contended the employees' petition was tainted by unfair labor practices. Subsequently, in January 2003 Respondent announced allegedly unlawful changes in its collective bargaining agreement.

On March 7, 2003 the Union informed Respondent that it represented a majority of the unit employees and supplied the Union with evidence supporting that claim. Respondent replied that it did not believe the Union represented a majority. The collective bargaining agreement terminated on March 8, 2003.

Section 8(a)(1) and related issues:
November 21, 2002:

Employee Cornelius Graham testified that he signed a petition rejecting the Union. He signed that petition on November 21, 2002 in the maintenance office. There were other employees in the maintenance office at that time along with supervisor Johnny Jones. After Graham signed the petition and was leaving Johnny Jones said, "thanks for your support." Later, that same afternoon, Graham walked up to Johnny Jones in the parking lot and asked Jones, "what's going on with the union?" Jones replied, "We are not

making any raises due to the union and just we, you know, trying to see if we can get it out."

Cornelius Graham also testified that he went to Charles Templeton's office on November 21, and asked Templeton what was going on with the union and why was it trying to be voted out. Templeton showed papers from a red folder that illustrated wages at Respondent and at other companies. Graham testified the documents showed wages at the other companies were higher than wages at Respondent. Templeton said the first year contract was a big success and that was why they were trying to get the Union out. Charles Templeton admitted that Graham did come by his office around November 21, 2002. Templeton denied that he had the conversation testified to by Graham. He does maintain a red folder and he showed Graham that folder. However, the only document he keeps in that folder is the collective bargaining agreement. Templeton denied that he told any employee the employees would not receive wage increases because of the union.

December 2, 2002:

General Counsel alleged and Respondent admitted that the Union was the exclusive collective bargaining representative of the unit employees. On December 2, 2002 Respondent wrote the Union that it had received objective evidence[1] that a majority of its unit employees no longer wished to be represented by the Union and that it would withdraw recognition effective March 8, 2003.[2]

Second week of December 2002:

Pamela Kirkland testified that Charles Templeton called her into his office during the second week of December 2002. Templeton told Kirkland that this is not a reprimand but under no circumstances is union business to be discussed on company time. Templeton was asked on direct examination if he told Kirkland she could not engage in union activities on company time. Templeton answered yes. He subsequently explained that he was trying to enforce existing written rules regarding solicitation and distribution and that those rules prohibit solicitation on company work time. He testified that he told Kirkland that she could not discuss union business or any other kind of solicitation on work time.

Findings:

Credibility:

Testimony given by Charles Templeton, Cornelius Graham and Pamela Kirkland is critical to an analysis of the issues herein. Charles Templeton is Respondent's administrator. Counsel for General Counsel alleged that Templeton engaged in unlawful conduct by his comments to Graham and Kirkland. Additionally, General Counsel alleged

[1] There is no dispute that Respondent received a petition signed by a majority of its unit employees stating their desire to not be represented by the Union (GCExh. 9).

[2] The collective bargaining agreement expired on March 8, 2003.

that supervisor Johnny Jones' comments to Cornelius Graham were unlawful. Jones did not testify.

As shown above, Cornelius Graham testified and Templeton admitted that Graham went to Templeton's office on November 21, 2002. Templeton denied that he had the conversation testified to by Graham. Templeton denied that he told any employee they would not receive wage increases because of the union.

Graham appeared unsure of his testimony regarding his conversation with Templeton. He testified that Templeton said the first year of the collective bargaining contract had been a big success and Templeton showed him wages of other employers. In view of the full record and their demeanor, I credit Templeton and do not credit Graham to the extent their testimony conflicts. As to Graham's testimony regarding Johnny Jones, I credit Graham. Jones did not testify and Graham's testimony in that regard stands unrebutted.

Pamela Kirkland testified that Templeton called her into his office during the second week of December 2002. Templeton told Kirkland that this is not a reprimand but under no circumstances is union business to be discussed on company time. Charles Templeton testified that he did have a conversation as related by Pamela Kirkland. After initially admitting that he told Kirkland she could not discuss the Union on company time, he testified that he told Kirkland that she could not discuss union business or any other kind of solicitation on work time.

Respondent pointed to its employees' handbook (RExh. 1) as supporting Templeton's version of his conversation with Kirkland. At page 35 the handbook contains a no solicitation rule which prohibits solicitation during work time. Work time is explained in that rule: "'Work time' does not include meal time or break time or other specified periods during the workday when employees are properly not engaged in performing their duties."

However, in view of the entire record and especially in view of the demeanor of Templeton and Kirkland, along with Templeton's initial admission that Kirkland testified correctly, I credit the testimony of Kirkland.

Supervisor Jones:

It is alleged that supervisor Johnny Jones told an employee that employees were not receiving wage increases because of the Union. As shown above that allegation was supported by substantial evidence. Cornelius Graham testified[3] that after he signed the petition to reject the Union he walked up to Jones in the parking lot and asked what was going on with the Union. At that time Jones was aware of Graham having signed the petition against the Union. Jones replied, "We are not making any raises due to the union and just we, you know, trying to see if we can get it out." Jones' comments included a

[3] Jones did not testify and Graham's testimony regarding Jones was not disputed. Respondent did show that even though Jones was a supervisor he was not a supervisor in maintenance.

threat that employees had lost wage increases because of the Union and constituted a violation of Section 8(a)(1).

Administrator Charles O. Templeton:

November 21:

It was alleged that Templeton also told Cornelius Graham that employees were not receiving wage increases because of the Union. As shown above I did not credit Graham's testimony regarding his November 21 meeting with Templeton. Instead I credited Templeton's testimony. That testimony showed that he did engage in conduct which constituted a violation of Section 8(a)(1).

Second week of December:

As shown above I credited the testimony of Pamela Kirkland that Charles Templeton told he she could not discuss union business on company time. Despite the narrow wording of its written no-solicitation rule, Templeton's comment included a cautioning that is too broad and constituted an additional violation of Section 8(a)(1).

The questions regarding the December 2 petition:

Respondent received a petition on December 2, 2002 signed by a majority of its bargaining unit employees. That petition (GCExh. 9) was captioned, "We, The employees of Parkwood Development Center do not want to be represented by the United Food and Commercial Workers Union Local 1996." Respondent wrote the Union that it had received the petition and that it would withdraw recognition at the end of the contract on March 8, 2003.

There is no dispute that Respondent received the unit employees' petition on December 2. However, General Counsel contended the petition was tainted by Respondent's unfair labor practices.

As shown above, I find that Respondent engaged on one violation of Section 8(a)(1) before Respondent received its employees' petition. That violation occurred on November 21 when supervisor Jones told Cornelius Graham the employees were not making raises due to the union and he wanted to get the Union out. The second unfair labor practice which involved Administrator Templeton and Pamela Kirkland, occurred after Respondent received the December 2 petition and, for that reason, could not have tainted the petition.

As to the November 21 conversation between Jones and Graham, that conversation occurred after Cornelius Graham signed the petition against the Union. Graham testified that several people including supervisor Jones were present in the room where he signed the petition. Jones had said nothing to Graham before Graham signed the petition. After Graham signed the petition Jones thanked him.

Later that same day Graham approached Jones and asked Jones about the Union. At that time Jones made his Section 8(a)(1) comment.

Those findings show that the November 21 Section 8(a)(1) violation did not taint the anti-union petition. Obviously, the unfair labor practice did not influence Cornelius Graham. Graham signed the petition before Jones' 8(a)(1) comment.

Moreover, there was no showing that any other employee that signed the petition was aware of Jones' November 21 comments to Graham. Therefore, I find the evidence failed to show that any unfair labor practice influenced one or more employees to sign the anti-union petition. There was no causal relationship between the unlawful conduct and the petition. ***Master Slack Corp***., 271 NLRB 78 (1984).

Section 8(a)(5) allegations:

January 2003:

General Counsel alleged that Respondent engaged in unfair labor practices in January 2003 by changing its health insurance program by charging its employees a premium without notifying or first bargaining with the Union.

There is no factual dispute but that Respondent changed its health insurance program by charging its unit employees each pay period for a portion of individual coverage premiums.[4] That change was announced to employees on January 14, 2003. It became effective on February 1, 2003.

There is no dispute but that the collective bargaining agreement did not expire until March 8, 2003. The collective bargaining agreement included the following regarding health insurance at Article 23:

> *The Employer will provide eligible employees coverage under the health insurance program afforded to other employees at the facility. There is no charge for individual coverage under this program. Dependent/family coverage will be made available if employees elect to pay the group rates for such additional coverage. The Employer retains the ability to provide similar coverage through another insurance carrier, as well as to change coverage terms and/or carriers if such action were taken on a corporate-wide basis.*

Respondent did not notify or bargain with the Union regarding that change in insurance premiums.[5] Before the change, unit employees were not required to pay anything for individual health insurance coverage.

The Union filed a grievance over Respondent's health insurance change. The grievance went to arbitration and the arbitrator found the grievance had merit. The

[4] From February 1, 2003 unit employees were charged $20 for medical coverage, $8.88 for dental coverage and $1.00 for vision coverage, per pay period.

[5] Respondent argued that its notification to unit employees constituted notice to the Union.

arbitrator's award included restoration of the premiums charged unit employees from February 1 until the expiration of the collective bargaining agreement on March 8.

March 8, 2003:

On March 7, 2003 the Union wrote Respondent:

> *Enclosed is proof that United Food and Commercial Workers Union Local 1996 is the majority representative of the employees in the bargaining unit at your facility. The workers have revoked the petitions previously submitted to you. Enclosed are copies of those revocations. The United Food and Commercial Workers Union Local 1996 demands that you commence bargaining for a new collective bargaining agreement and you continue to recognize the union. * * (GCExh. 5)*

Respondent replied on March 7:

> ** * * Please be advised that PDC does not believe that Local 1996 represents a majority of its employees and hereby denies your demand for recognition. Under these circumstances, if the Union believes that it has the support of a majority of employees, you are certainly familiar with the avenues available for pursuing representation rights under the National Labor Relations Act.*

Findings:

Credibility:

There are no significant, material factual disputes regarding the January and March 2003 allegations.

Conclusions:

January 2003:

Respondent changed its health insurance program effective February 1, 2003. Before February 1 unit employees were not required to pay for individual health insurance. From February 1 unit employees were required to pay a portion of the premiums each per pay period for individual health insurance.

Respondent argued that the February 1 change was authorized under the terms of its collective bargaining contract. Since it applied the change to all employees its action fell within the enabling provision of the last sentence of Article 23:

> *The Employer retains the ability to provide similar coverage through another insurance carrier, as well as to change coverage terms and/or carriers if such action were taken on a corporate-wide basis.*

Respondent offered parole evidence that it intended to extend the same health coverage to all employees and its February 1 change in individual insurance premiums did involve all employees.

Parole evidence may be relevant where a contract is ambiguous. In this instance I am convinced that the relevant contract provision was not ambiguous and parole evidence regarding Respondent's intent is not relevant. ***Sansia, Inc***., 323 NLRB 107 (1997). The key here is the contract provision that there "is no charge for individual coverage". Moreover, nothing in the health insurance provisions of the contract permitted Respondent to change employees' premiums. The only changes mentioned regard the right of Respondent to change insurance carriers and to change the coverage terms.

The contract continued to apply to unit employees until March 8 and the Union should have been given an opportunity to bargain before Respondent changed to a policy of charging for individual health insurance coverage.

March 8, 2003:

Respondent notified the Union on December 2, 2002 that it had objective evidence that a majority of its unit employees wished to no longer be represented by the Union. It gave that notice to the Union after receiving a petition signed by a majority of its unit employees.

The Board considered the question of what is timely filing of a petition to remove a union representing employees of a health care institution[6], in ***Trinity Lutheran Hospital***, 218 NLRB 199 (1975). There the Board held that all petitions filed more than 90 days but not over 120 days before the terminal date of any contract will hereafter be found timely. Here the employees submitted their petition to Respondent on December 2. That was 96 days before the contract expired on March 8, 2003. Therefore, Respondent was justified in treating the employee's petition as being timely.

On March 7, 2003 the Union wrote Respondent that a majority of the unit employees desired Union representation. The Union included in that letter evidence of majority representation. Some of the employees showed that they revoked their signatures to the December 2 petition to get rid of the Union. Respondent replied to the Union that it did not believe the Union represented a majority of its unit employees.

Determinations:

January:

In view of the full record, I find Respondent had a duty to notify and bargain on demand with the Union before making changes to the collective bargaining agreement during that agreement's term. Individual medical insurance was one of the provisions of that agreement and Respondent's changed that portion of the contract, which stated there "is no charge for individual coverage" under the health insurance program. From February 1, 2003 unit employees were charged for individual coverage under the health insurance program. Respondent's unilateral change constitutes a violation of Section 8(a)(1) and (5). See ***Laborers Health and Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co., Inc.,*** 484 U.S. 539 (1988).

[6] There is no dispute but that Respondent was a health care institution at all material times.

March:

In ***Levitz Furniture Co***., 333 NLRB No. 105 (2001), the Board considered a factual situation similar to the instant case. There, like here, the employer and the union were parties to a collective bargaining agreement. That contact expired on January 31, 1995. On December 1, 1994 the employer received a petition signed by a majority of its unit employees stating that they did not wish to be represented by the union. On December 2, 1994 the employer informed the union that it had received objective evidence that the union had lost majority support and that it would withdraw recognition effective at the end of the collective bargaining agreement.

On December 14, 1994 the union informed the employer that it had objective evidence of its majority status and was ready at any time to demonstrate that fact. The employer acknowledged the union's claim on December 21 but repeated that it had objective evidence that the union had lost majority support and stated that, except as required by the contract, it would no longer recognize the union. The Board found that the employer continued to honor the contract until it expired on January 31, 1995. When the contract expired the employer withdrew recognition.

The Board found no refusal to bargain in ***Levitz***, stating:

> *We find that the Respondent has demonstrated that it had a good-faith uncertainty as to the Union's continued majority status when it withdrew recognition on February 1. The Respondent had previously received a petition, apparently signed by a majority of the unit employees, stating that they no longer wished to be represented by the Union. The Union later offered to prove that it still had majority support. But even if the Respondent had inspected the Union's claimed evidence, and even if that evidence had supported the Union's assertion, it would simply have produced a conflict with the earlier petition. Thus, the Respondent could still reasonably have been uncertain about the Union's majority status. Under* ***Allentown Mack****, then, the Respondent was warranted in withdrawing recognition.*

There are at least two differences between ***Levitz*** and the instant case. Unlike ***Levitz***, Respondent did not fully comply with all the contractual terms before the contract expired. Here, as shown above, Respondent made a unilateral change by unlawfully changing it health insurance policy to require employee contributions. Additionally, the union in ***Levitz*** reacted more quickly to the employer's declaration that it would withdraw recognition at the expiration of the contract. There the union responded in 12 days. Here, the Union did not respond until the day before the contract expired. That was over three months after the Respondent notified the Union it would withdraw recognition.

Nevertheless, there is no doubt that ***Levitz*** is the controlling law in this instance. However, that are inconsistencies between the Board's holding in ***Levitz*** and the Board's announcement in ***Levitz*** as to prospective rulings. There, the Board stated among other things, that the,

> *court's decision in Allentown Mack had a significant impact on the Board's long established scheme. As a result of that decision, employers may now withdraw recognition from unions based on reasonable uncertainty, * * * **Levitz Furniture Co., 333 NLRB** No. 105, slip opin. 6 (2001).*

The Board then considered in its analysis, whether it should apply different standards in the future, regarding the questions of (1) withdrawal of recognition; (2) the filing of a RM petition; and (3) the polling of employees. The Board decided to apply one standard when an employer has withdrawn recognition, another standard when an employer filed a RM petition, and to delay in deciding upon a standard in polling cases.

The standard the Board decided to apply in withdrawal of recognition cases, is stated at page 7 of the ***Levitz*** slip opinion:

> *We recognize that here are a multitude of options, each with supporters and critics. We have carefully considered those numerous possibilities in light of the Act's text and policies. In our view, there is no basis in either law or policy for allowing an employer to withdraw recognition from an incumbent union that retains the support of a majority of the unit employees, even on a good faith belief that majority support has been lost. Accordingly, we shall no longer allow an employer to withdraw recognition unless it can prove that an incumbent union has, in fact, lost majority support.*

Then, in the next paragraph, the Board stated its determination for cases involving the filing of a RM petition:

> *While adopting a more stringent standard for withdrawals of recognition, we find it appropriate to adopt a different, more lenient standard for obtaining RM elections. Thus, we emphasize that Board-conducted elections are the preferred way to resolve questions regarding employees' support for unions. For that reason, we find it appropriate to abandon the unitary standard for withdrawing recognition and processing RM petitions. Instead, we shall allow employers to obtain RM elections by demonstrating reasonable good-faith uncertainty as to incumbent unions' continued majority status.*

In ***Levitz*** as in the instant case, there was no question of Respondent filing a RM petition. Instead the Board was concerned with a withdrawal of recognition and it held that ***Levitz*** did not act unlawfully because it had an uncertainty as to the majority support of the union. However, the Board announced that in the future it would apply a different standard for withdrawal of recognition cases. Instead of concerning itself with the belief of the employer it would look to the evidence regarding majority support. Only when evidence revealed that a Union had lost majority support would the employer be justified in withdrawing recognition.

I shall apply the prospective standard announced by the Board for withdrawal of recognition regarding Respondent's December 2 notice to the Union. That standard set out in the ***Levitz*** decision was "*we shall no longer allow an employer to withdraw*

recognition unless it can prove that an incumbent union has, in fact, lost majority support." The uncontested evidence included a petition of the employees submitted to Respondent on December 2 showed that the Union had lost its majority support.

There were no negotiations nor were there requests to negotiate, after Respondent notified the Union of its plan to withdraw recognition.

On March 7, 2003 the Union wrote Respondent that it had majority representation and it included proof of its claim. Respondent replied that same day that it doubted the Union's claim and would not recognize the Union.

The Union argued that March 7 proof rebutted the December 2 evidence that the Union had lost majority status. However, that claim is illogical. At most, the March 7 events illustrated that perhaps some of the unit employees changed their minds after December 2. Moreover, a similar situation existed in ***Levitz*** and the Board did not find that the subsequent petition supporting the Union had compromised the employees' earlier petition against the Union.

From December Respondent was apparently aware only that the Union had lost its majority. That issue was called into question over three months later when the Union submitted evidence that a majority of the unit employees wanted Union representation.

It is apparent that Respondent was justified in expressing doubt at to the Union's claim in its reply letter of March 7.[7] Under both the actual holding in ***Levitz*** which found no unfair labor practice on the basis of General Counsel's failure to prove that ***Levitz*** lacked a reasonable uncertainty and under the prospective standard the ***Levitz*** Board applied to RM petition rights, Respondent would prevail.

Additionally, I must consider the Supreme Court's ruling in ***Allentown Mack Sales & Service v. NLRB***, 522 U.S. 359 (1998). There the issue involved an employer's poll of unit employees. In brief, the Court accepted that the Union was an incumbent union of a successor employer and that the Union had made a demand for recognition on claim of majority. The employer replied that it had a good faith doubt as to support of the Union among the employees but that it had arranged for an independent poll by secret ballot of its unit employees. That poll resulted in a loss for the Union and in subsequent unfair labor practices proceedings the Board found the employer had unlawfully withdrawn recognition.

The Court held among other things that doubt should mean uncertainty. It stated,

> *(T)he question presented for review, therefore, is whether, on the evidence presented to the Board, a reasonable jury could have found that Allentown lacked a genuine, reasonable uncertainty about whether Local 724 enjoyed the continuing support of a majority of unit employees. In our view, the answer is no. The Board's finding to the contrary rests on a refusal to credit probative*

[7] In ***Levitz*** the employer expressed doubt after the Union offered to prove its majority support.

> *circumstantial evidence, and on evidentiary demands that go beyond the substantive standard the Board purports to apply. (522 U.S. 367, 368)*

The Court went on to hold that the Board's reasonable doubt standard for polling employees is facially rational and consistent with the Act but its finding that the employer is that case lacked such a doubt was not supported by substantial evidence on the record as a whole.

Here, the question may be *should the applied standard require evidence of lost majority or evidence of uncertainty*.

The evidence in this particular case lends practical support to application of the uncertainty standard. On March 7 (i.e., the day before the contract expired), the Union presented evidence of majority support. From receipt of that claim, Respondent was justified in claiming uncertainty in view of both the Union's March 7 letter and its receipt of a petition showing lack of majority support on December 2. However, under a strict reading of the Board's new standard for withdrawal of recognition, Respondent may have engaged in unfair labor practices by withdrawing recognition on or after March 7. The evidence did not clearly establish that a majority of the unit employees did not support the Union on that date.

The relevant standard in this case is did the Union actually lose its majority support. The evidence shows that in December 2002 Respondent received an untainted petition signed by a majority of its unit employees. The petition showed that the Union lost its majority and at that time Respondent announced that it was withdrawing recognition. Respondent met the ***Levitz*** prospective standard for withdrawal of recognition on December 2, 2002.

The situation was different on March 7, 2003. At that time the evidence was unclear whether the Union had actually lost its majority support. Further analysis is necessary to determine whether Respondent committed an unfair labor practice by failing to recognize the Union on or after March 7.

The question as of March 7, may be did *Respondent engage in unlawful conduct by refusing to rescind its prior announced plan to withdraw recognition*. At that time, in accord with ***Levitz***, there was a "reasonable uncertainty" that the Union represented a majority.[8] Although clear evidence of a lost majority was lacking on March 7, some consideration must be given to the converse of the "withdrawal of recognition" standard. If Respondent had recognized the Union on March 7 it would have done so despite its confusion or uncertainty about whether the Union enjoyed a majority and it would have possibly subjected itself to a Section 8(a)(2) violation. Moreover, if Respondent had rescinded its withdrawal of recognition as announced on December 2, the unit employees would have been subjected to Union representation regardless of their actual desire.

[8] As in ***Allentown Mack Sales*** Respondent had received conflicting petitions as to whether a majority of its unit employees wanted union representation.

The record evidence showed that the Union had lost majority support at the time of Respondent December 2 announcement that it would withdraw recognition at the conclusion of the collective bargaining agreement. The record evidence of subsequent events showed that a reasonable uncertainty was created on March 7 when the Union offered proof that it represented a majority of the unit employees. If Respondent had not made an earlier announcement of its plan to withdraw recognition, it is possible that it would have engaged in an illegal withdrawal of recognition if it had, for the first time, announced its withdrawal of recognition on March 8. That is true because on March 8 the evidence did not show without dispute or question, that the Union had lost majority support. In other words the evidence at that time did not satisfy the prospective standard for determining the legality of withdrawal of recognition under ***Levitz***.

However, the undisputed record evidence showed that Respondent did make an earlier announcement that it would withdraw recognition. After receiving the employees' December 2 petition Respondent announced it would withdraw recognition on the March 8 expiration of the contract. At that time the evidence showed "*that an incumbent union has, in fact, lost majority support*."

It appears that the situation that developed on March 7 when the Union wrote Respondent and offered proof that it represented a majority of unit employees, was unlike what was anticipated by the ***Levitz*** Board in announcing its prospective withdrawal of recognition standard. Instead of a situation where an employer withdrew recognition against a background of presumed majority such as under the contract bar rule, the unit employees by their December 2 petition, had shown that the Union did not have a majority. So, when the Union's March 7 letter created a reasonable uncertainty there was no presumption of majority. Instead since December 2 the proof had been to the contrary.

Under those circumstances Respondent may have been legally foreclosed from rescinding its earlier declaration and recognizing the Union. Instead under the holdings in ***Allentown*** and ***Levitz***, it may have been forced to view the situation as, at most, a reasonable uncertainty of representation. That reasonable uncertainty was cast against a background of evidence showing that the Union had lost majority status on or before December 2, 2002 when a majority of the unit employees petitioned against representation.

Of course, there was one avenue open to Respondent, which would not have involved a risk of unlawful conduct. That would have involved Respondent filing a RM petition. However, for whatever reason, Respondent did not file a representation petition. Moreover, neither did the Union file a representation petition on or after March 8.

The evidence here may not fit into the Board's prospective standard for withdrawal of recognition issues. However, I am convinced that the employees' December 2 petition followed by Respondent's immediate notice to the Union that it would withdraw recognition because of the Union's loss of majority, changed this matter from a "withdrawal of recognition" question. On March 7 when the Union offered proof that it then represented a majority, there was no presumption of Union majority. In that situation I am

convinced that Respondent had a reasonable uncertainty of the Union's majority and it could not have legally recognized the Union.

Moreover, the evidence here is very similar to the situation in ***Levitz***. Even though the union in ***Levitz*** as the Union here, subsequently offered proof of majority, the Board found no violation. I am not convinced that the Board intended to set a prospective standard for withdrawal of recognition cases, which would have resulted in a different finding in ***Levitz***.

Therefore, I find that Respondent did not engage in unlawful conduct by refusing to recognize the Union.

Conclusions of Law

1. By telling its employee that because of the Union employees were not receiving wage increases and by telling its employee that employees could not engage in union activities on company time, Respondent, Parkwood Developmental Center, Inc. engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By unilaterally changing unit employees' medical insurance program by charging bargaining unit employees each per pay period for a portion of individual coverage premiums without notice or bargaining with the Union, Respondent, Parkwood Developmental Center, Inc., violated Section 8(a)(1) and (3) of the Act.

3. Respondent has not otherwise engaged in unfair labor practices as alleged in the complaint.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

In view of my finding that Respondent unilaterally charged its bargaining unit employees for individual health insurance coverage, I order Respondent to make bargaining unit employees whole for all losses suffered during the period beginning February 1, 2003 and ending at the March 8, 2003 expiration of the collective bargaining agreement.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

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9 If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Parkwood Developmental Center, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(i) Telling its employees that because of the Union employees were not receiving wage increases.

(ii) Telling its employees that employees could not engage in union activities on company time.

(iii) Unilaterally changing the terms of its collective bargaining agreement by charging employees for individual health care coverage.

(iv) In any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed you by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(i) Within 14 days from the date of this Order, make all bargaining unit employees employed during the February 1 to March 8, 2003 period whole for all losses suffered during that period, due to our unlawful change in our collective bargaining agreement with United Food and Commercial Workers International Union, Local 1996, AFL-CIO, CLC.

(ii) Within 14 days after service by the Region, post at its facility and office in Valdosta, Georgia copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 2002.

[10] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading **"POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD"** shall read **"POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."**

(iii) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C.

_____

Pargen Robertson
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board had found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT tell our employees that they are not receiving wage increases because of the United Food and Commercial Workers International Union, Local 1996, AFL-CIO, CLC.

WE WILL NOT tell our employees they cannot talk about the union during company time.

WE WILL NOT unilaterally change the terms of our existing collective bargaining agreement with the Union by charging our employees for individual health insurance coverage.

WE WILL make all bargaining unit employees employed at any time from February 1, 2003 until March 8, 2003 whole for losses suffered during that February 1 to March 8 period because of our unilateral change in their health insurance premiums.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed you by Section 7 of the Act.

PARKWOOD DEVELOPMENTAL CENTER, INC.
(Employer)

Dated: _____ **By:** _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret–ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

South Trust Plaza – Suite 530, 201 East Kennedy Blvd., Tampa, FL 33602–5824

(813) 228–2641, Hours: 8 a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (813) 228–2662.